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No. A-119

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IN THE

Supreme Court of the United States

TERM _____

HENRY TIMOTHY FOULDS,

Appellant,

vs.

PENNSYLVANIA,

Respondents.

ON APPEAL FROM THE
SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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STATEMENT OF JURISDICTION

The questions presented by this appeal are:

a. Whether the lower court erred in failing to take judicial notice of a federal statute and whether the Superior Court erred in their ruling that any possible error in the lower Court's failure to take judicial notice of a federal statute was harmless beyond a reasonable doubt.

b. Whether when the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution guarantees of privacy are involved, a violation of that zone of reasonable expectation of privacy requires a clear showing of consent based upon evidence actually of record and cannot be based, as here, when no warrant was sought or issued, upon inferences not supported by the record.

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GROUNDS FOR JURISDICTION

This is an appeal from the final judgment of the Supreme Court of Pennsylvania, dated May 3, 1982, denying appellant's Petition for Allowance of Appeal. The Notice of Appeal herein was filed with the Supreme Court of Pennsylvania on July 9, 1982. Appellee received appellant's jurisdictional statement (Notice of Appeal) on July 9, 1982.

This appeal to Your Honorable Court is based upon 23 U.S.C. 1257(1)(2)(3), 28 U.S.C. 2101(d) and United States Supreme Court Rules 10, 11 and 12.

CONSTITUTIONAL PROVISIONS

The constitutional provisions and statutes that this case involves are as follows:

34 Pa. C.S.A. §780-102 Definitions

"Marihuana" consists of all forms, species and/or varieties of the genus Cannabis Sativa L., whether growing or not. . . .

35 Pa. C.S.A. §780-104 Schedules of controlled substances

The following schedules include the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated:

(1) Schedule I—In determining that a substance comes within this schedule, the secretary shall find: a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision. The following controlled substances are included in this schedule: (iv) marihuana.

21 U.S.C.A. §209 Same; poisons; book entry of sale; labels

It shall be unlawful for any person, firm or corporation whose permanent allegiance is due to the United States to sell or deliver to any other person any of the following described substances, or any poisonous compound, combination, or preparation thereof, to wit: — cannabis indica. . . .

Article I, Section 8 of the Pennsylvania Constitution Security from searches and seizures

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize

any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Amendment 4 to the United States Constitution

Unreasonable searches and prohibited seizure

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

On or about the night of March 30, 1978 (T11) at 10:30 o'clock P.M. (T16) four police agents (T31, 42, 43, 45) without having made an attempt to get an arrest warrant or search warrant (T20, 21, 24, 32, 33) appeared at the residence of Appellant and his parents, undercover, uninvited and unannounced. (T31, 32, 33, 37, 43). The Appellant was arrested for violation of the Controlled Drug, Device and Cosmetic Act, 35 Pa. C.S.A. §780-104, and evidence seized; said arrest and seizure of evidence being based on information secured through the warrantless, uninvited, deceptive entrance into his private home after 10:00 o'clock P.M. at night, (T17, 25) by use of psychological duress on Appellant's mother and bold, uninvited entry past the shocked and physically intimidated mother of the Appellant, into the house, up the stairway, down the hallway to the rear of the second floor of the building and into the bedroom of the Appellant, where Appellant, ill at the time, was sleeping in bed with his wife (T31, 32, 33, 37, 39, 40, 41, 42 Suppression Finding of Fact No. 5).

A written omnibus pre-trial motion was filed with the Court of Common Pleas of Northumberland County on July 19, 1978. A hearing was held on that motion on August 28, 1978 before The Honorable Peter Krehel. On August 30, 1978, an Order was entered denying the Motion to Suppress.

On September 12, 1978, trial was held at No. CR78-104 of the Court of Common Pleas of Northumberland County and on September 13, 1982, Appellant Henry T. Foulds was convicted of criminal violations of the Controlled Drug, Device and Cosmetic Act, to wit: unlawful possession of a controlled substance with intent to deliver, and unlawful possession of a controlled substance.

At trial, during cross-examination of prosecution expert witness from the crime lab, Defense Counsel asked the witness if he tested the drug to determine if it was cannabis indica or cannabis sativa. The prosecution witness denied the existence of cannabis indica and admitted that he did not test the plant to determine if it was cannabis indica. Counsel for Appellant requested that the Court take judicial notice of 21 U.S.C.A. §209 which lists cannabis indica as a prohibited poison according to Federal Law. The Court refused to take judicial notice and Counsel for Appellant took exception. The Court instructed the jury to disregard the point and thus prevented the jury from considering whether the evidence was or could have been cannabis indica, which substance is not listed as a controlled substance in the Pennsylvania statute under which Appellant was charged.

On December 28, 1979, the Suppression Judge filed an opinion containing findings of fact and conclusions of law supporting the denial of the motion to suppress.

Post verdict motions were filed containing the issues of suppression of the evidence and failure to take judicial notice of the Federal Statute. Argument on the post ver-

dict motions was held on February 4, 1980. The post verdict motions were denied on April 29, 1980 with an opinion filed November 28, 1980, by The Honorable Samuel C. Ranck sitting as Court En Banc.

The opinion denying Appellant's post verdict motions did not address the question of error due to failure to take judicial notice of the Federal Statute.

Counsel for Appellant has not formally requested a copy of the trial transcript because at argument of post trial motions, it was discussed and agreed by Counsel and the Court that for reasons of time, judicial economy, and the single short exception to be argued from the trial record, the transcription of the notes of testimony would not be necessary.

Judgment of sentence was entered on June 5, 1980, by The Honorable Samuel C. Ranck, where the appellant was sentenced on the Following charges:

a. CR 78-104 (a) unlawful possession with intent to deliver a controlled substance—not less than one and one-half (1 ½) years and not more than five (5) years in a state correctional institution, Defendant to pay costs of prosecution.

b. CR 78-104 (b) unlawful possession of a controlled substance—six to twelve (6-12) months at a state correctional institution concurrent with CR 78-104 (a).

On February 17, 1981, the appellant perfected an appeal to the Superior Court of Pennsylvania from the April 25, 1980 Order denying post verdict motions and of judgment of sentence and was entered to Nos. 1293 and 1490 Superior Court of PA 1980—Philadelphia, Pa.

By order dated December 18, 1981, the Superior Court of Pennsylvania affirmed the judgment of the Court of Common Pleas of Northumberland County Criminal Division, entered to No. CR 78-104.

A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was filed on January 21, 1982. By Order dated May 3, 1982, the Supreme Court of Pennsylvania denied Appellant's Petition for Allowance of Appeal.

On July 9, 1982, a Notice of Appeal was filed with the Supreme Court of Pennsylvania and served upon the Appellee.

By Order dated August 4, 1982, The Honorable William J. Brennan, Jr., Associate Justice of the United States Supreme Court, extended the time for docketing the within appeal until and including September 30, 1982.

CONSIDERATION OF QUESTIONS

Appellant by his Counsel, Robert P. Petyak, Esquire, avers that the questions presented are so substantial as to require primary consideration, with briefs on the merits and oral argument, for their resolution, for the following reasons:

1. A substantial Fourth Amendment question is involved herein. A reading of the facts and circumstances contained in the record of the instant case reveals that what happened was a uniquely bold, uninvited, nightime, warrantless intrusion into the private home by undercover police agents who neither sought nor obtained consent to enter. Such a violation of public policy favoring the right to privacy in the home is so egregious as to warrant the invoking of the exclusionary doctrine to preserve the integrity of the judicial system and to discourage intolerable police conduct.

2. The supremacy of a Federal statute is involved. The failure to take judicial notice of which constituted error in that said failure violated claimant's right to a fair trial, to wit:

Pennsylvania statutes outlining marijuana prohibit specifically cannabis sativa. During jury trial, on cross-examination of the prosecution's expert witness from the crime lab, Defense Counsel asked the witness if he tested the substance to determine if it was cannabis indica or cannabis sativa. The prosecution witness denied the existence of cannabis indica and admitted that he did not test the plant to determine if it was cannabis indica. Defense Counsel requested the Court take judicial notice of Title 21, Section 209 of the United States Code which lists cannabis indica as a prohibited poison according to Federal Law. The Court refused and Counsel took exception.

Respectfully submitted,

/s/ Robert P. Petyak
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